IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1872

BRIGHTON BUILDING & MAINTENANCE CO., WESTERN ASPHALT PAVING CO., and THOMAS J. BOWLER,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 18, 1979

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 18, 1979.

OPINION BELOW

The Court of Appeals' opinion, reported at 1979-1 Trade Cases ¶ 62,637 (7th Cir. 1979), appears as Appendix A hereto.

JURISDICTION

The judgment below was entered on May 18, 1979, and this petition is timely filed, in accordance with Rules 22(2) and 34(1) of this Court. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the jury was properly instructed that proof beyond a reasonable doubt of specific intent is a necessary element in a criminal case charging a price-fixing violation under § 1 of the Sherman Anti-Trust Act (15 U.S.C. § 1).

STATUTE AND RULE INVOLVED

United States Code, Title 15:

> § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Rules of the Supreme Court of the United States:

> Rule 46. "Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition."

STATEMENT OF CASE

Petitioners were convicted by a jury of one count of conspiracy and combination in restraint of trade in violation of Section 1 of the Sherman Anti-Trust Act (15 U.S.C. § 1) and thirty-seven counts of mail fraud (18 U.S.C. § 1341). The convictions stemmed from an alleged combination and conspiracy to suppress competition by filing bids in a

prearranged fashion on contracts for the part construction of Federal-Aid Interstate Highway No. 55 within the State of Illinois. (App. A-2).

Five contracts were involved, numbered 82, 83, 84, 85 and 88. Corporate defendants Brighton Building & Maintenance Company and Krug Excavating Company bid jointly, under the name B-K. Corporate defendants Palumbo Excavating Company, Thomas M. Madden Company and J. M. Corbett Company bid jointly, under the name PMC. Corporate defendant Arcole Midwest Corporation ("Arcole") bid separately.

Arcole pleaded guilty prior to trial, and the government's case rested principally on the testimony of Ernest Bederman, president of Arcole. Bederman testified that the chief executive officers of the various corporate defendants agreed to file their bids in a prearranged fashion. Bederman testified that the "agreement" provided that B-K would be the only or low bidder on jobs 82 and 83, PMC on 84, and Arcole on 85 and 88. In fact, the actual bids were inconsistent with any such agreement: B-K "submitted a bid on 84 as well, lower than the PMC bid, and B-K was awarded the contract." (App. A-3).

Petitioner Bowler, who broke the alleged Bederman agreement by submitting the accepted low bid on Project 84, was sentenced to a prison term and he and the corporate defendants were fined. On appeal, petitioners' challenges included the contention that the jury was not properly instructed on the issue of intent. (App. A-5). The trial judge's charge to the jury, given in November, 1977, included the following instruction:

> "It is not necessary to find a specific intent to violate the law, for the parties are deemed to have intended the necessary and direct consequences of their acts." (App. A-25).

Petitioners argued below that this instruction violated the specific intent holding in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), and earlier cases cited therein. The lower court, in affirming the convictions, erroneously distinguished *Gypsum*:

> An agreement for price maintenance is an unreasonable restraint unlawful *per se* under the Sherman Act. We do not read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement which is unlawful *per se*, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce. (App. A-8-9) (Citation omitted).

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES* v. *UNITED STATES GYPSUM CO.*, 438 U.S. 422 (1978).

This Petition presents the question whether or not the intent element was correctly explained to the jury. One year ago this Court, stating its "unwilling[ness] to construe the Sherman Act as mandating a regime of strict liability criminal offenses," held that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element." *United States* v. *United States Gypsum Co.*, *supra* at 436, 443. Anchoring its decision in fundamental principles of Anglo-American criminal jurisprudence, *Id.* at 436-37, this Court required proof that the anti-competitive effects stemmed from "action undertaken with knowledge of its probable consequences," *Id.* at 444. Though a jury can infer the requisite intent from the evidence before it, this Court in *Gypsum* held that the decision to draw such an inference could not be taken from the trier of fact through reliance on a legal presumption of wrongful intent:

> Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. *Id.* at 446.

Before the ink was dry on 438 U.S., the official report of *United States* v. *United States Gypsum Co.* ("Gypsum"), the Third[1] and Seventh Circuits had already carved out an exception to the basic holding in *Gypsum*—an exception that threatens to eviscerate what this Court has described as an "indispensable element of a criminal offense." *Id.* at 437. Both Circuits, in effect, ignore this Court's *Gypsum* holding when the alleged conduct constitutes a *per se* violation of the Sherman Act.

In this case, the Court of Appeals considered a jury instruction nearly identical to the instruction held to invade the jury's fact finding function in *Gypsum, supra.* The trial court below instructed the jury as follows:

> It is not necessary to find a specific intent to violate the law, for the parties are deemed to have intended the necessary and direct consequences of their acts. [App. A-5].[2]

---

[1] *United States* v. *Gillen*, 1979-1 Trade Cases ¶ 62, 627 (3rd Cir. 1979) (Opinion appears as Appendix B).

[2] Compare with the jury instruction struck down by this Court in *Gypsum*:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of price information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended the result.

438 U.S. at 430.

Distinguishing this case from *Gypsum* on the grounds that this case involved a *per se* violation of the Sherman Act, the Court of Appeals held the challenged jury instruction to be proper.

Petitioners submit that this decision cannot be reconciled with the logic and the holding in *Gypsum*. There is nothing in the policy or history underlying the *per se* rule that even remotely suggests that the *Gypsum* specific intent requirement can be disregarded when a *per se* violation is charged.

Indeed, the broad language of the Sherman Act and the resulting indeterminancy of the borders of the conduct it regulates, coupled with the battery of penalties alternative to the criminal ones contained in the Act, militate against a regime of strict liability. *Gypsum, supra* at 438-43. *See Supreme Court, 1977 Term,* 92 Harv. L. Rev. 57, 296 (1978). The specific arguments against strict liability in criminal antitrust cases are buttressed when placed within the context of fundamental principles of criminal jurisprudence:

> [T]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. *United States,* 342 U.S. 246, 250 (1952), quoted in *Gypsum, supra* at 436. These specific arguments and general principles combined in *Gypsum* to produce a clear requirement that intent be proved—a requirement to which this Court made no exceptions:

> [W]e conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element. 438 U.S. at 443 (footnote omitted).

That the government must meet its burden of establishing intent in cases involving *per se* violations of the Sherman Act seemed clear to Circuit Judge Adams in his concurring opinion in *United States* v. *Gillen* (App. B-14, *et seq.*):

> As I understand the *Gypsum* opinion, it instructs that whether the criminal offense charged under Section 1 of the Sherman Act is a *per se* violation or whether at the other end of the spectrum it approaches "the gray zone of socially acceptable and economically justifiable conduct," the government must meet its burden of establishing intent. . . . Moreover, in establishing knowledge, the government, under the guidelines set forth in *Gypsum,* may not rely on a presumption that a defendant intends the necessary and direct consequences of his act, although an anti-competitive effect "may well support an inference that the defendant had knowledge of probability of such a consequence at the time he acted. (footnotes omitted) (App. B-16).

Nevertheless, the majorities in both *Gillen, supra,* and this case disregarded the unambiguous holding in *Gypsum.* Petitioners contend that Judge Adams' analysis of *Gypsum* is correct. Judge Adams, having sat on the *Gypsum* court at the intermediate appellate stages, is particularly familiar with that case and its holding.

Unlike the *Gypsum* defendants, petitioners here are subject to the recently increased criminal penalties for violation of the Sherman Act. Individual violations are now treated as felonies punishable by a fine not to exceed $100,000.00, or by imprisonment for up to 3 years, or both. Corporate violators are subject to a $1,000,000.00 fine. Pub.L. 93-528, § 3, 88 Stat. 1708, Dec. 21, 1974, amending 15 U.S.C. § 1. As this Court stated in *Gypsum,* the "severity of these sanctions provide further support for our conclusion that the Sherman Act should not be construed as

creating strict liability crimes." 438 U.S. at 442 n.18. An individual, such as petitioner Bowler, faced with the prospect of 3 years incarceration, is entitled to have the fundamental issue of intent decided by a jury of his peers.

Even if Congress had not recently increased the criminal penalties for violation of the Sherman Act, the stigma and the loss of freedom that follow a criminal conviction would alone constitute powerful reasons for prohibiting a regime of strict liability in *per se* violation cases:

> In its conventional and traditional application, a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compulsion) of conduct which is morally neutral. This would be true even if a statute were to be enacted proclaiming that no criminal conviction hereafter should ever be understood as casting any reflection on anybody. For statutes cannot change the meaning of words and make people stop thinking what they do think when they hear the words spoken. But it is doubly true—it is ten-fold, a hundred-fold, a thousand-fold true—when society continues to insist that some crimes *are* morally blameworthy and then tries to use the same epithet to describe conduct which is not. Hart, *The Aim of the Criminal Law,* 23 Law & Contemporary Problems 401, 424 (1959).

The government can hardly claim that a requirement of intent will be overly burdensome. Indeed, the requisite intent will be easier to prove when the alleged conduct constitutes a *per se* violation of the Sherman Act. However, "nowhere else in the criminal law is the probable, or even the certain, guilt of nine men regarded as sufficient warrant for the conviction of a tenth. In the tradition of Anglo-

American law, guilt of crime is personal. The main body of the criminal law, from the Constitution on down, makes sense on no other assumption." Hart, *supra* at 422-423.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Counsel for Petitioners

June 18, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 1979, the undersigned caused three copies of the Petition for Writ of Certiorari to be hand delivered to counsel for respondent, the United States of America. I further certify that all parties required to be served have been served.

/s/ Valentine A. Weber, Jr.

Valentine A. Weber, Jr.
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APPENDIX

Opinion by Judge Fairchild

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 18, 1979

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

Nos. 77-2295, 77-2296, 77-2297, 77-2299

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BRIGHTON BUILDING & MAINTENANCE CO., KRUG EXCAVATING COMPANY, WESTERN ASPHALT PAVING CO., UNION CONTRACTING & MATERIALS CO., THOMAS J. BOWLER, GEORGE B. KRUG, SR., J. M. CORBETT CO., THOS. M. MADDEN CO. and PALUMBO EXCAVATING CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 77-Cr-192

JOEL M. FLAUM,
Judge

This cause came on to be heard on the transcript of the record from the United States Circuit Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption Omitted in Printing)

Before FAIRCHILD, *Chief Judge,* and SPRECHER and BAUER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* This is an appeal from judgments upon conviction of defendants, Brighton Building & Maintenance Co., Krug Excavating Co., Western Asphalt Paving Co., Union Contracting & Materials Co., Thomas J. Bowler, George B. Krug, Sr., J. M. Corbett Co., Thos. M. Madden Co. and Palumbo Excavating Co. of one count of conspiracy and combination in unreasonable restraint of interstate trade in violation of Section 1 of the Sherman Anti-Trust Act (15 U.S.C. § 1) and thirty-seven counts of mail fraud (18 U.S.C. § 1341). Two additional defendants, Arcole Midwest Corp. and Crown-Trygg Co. were also indicted. Arcole Midwest pleaded guilty and did not participate in trial. The remaining defendants pleaded not guilty. On November 2, 1977, the jury found Crown-Trygg not guilty on all counts and the remaining defendants guilty on all counts. The individual defendants, Bowler

and Krug, were sentenced to prison terms. They and the corporate defendants were fined.

I

The indictment alleged that the State of Illinois let contracts on July 29, 1975 for the construction of Federal-Aid Interstate Route No. 55; that this was to be done by competitive bidding as required by law; that defendants and others engaged in a combination and conspiracy to suppress and eliminate competition in unreasonable restraint of trade by agreeing among themselves to allocate two projects to defendants Brighton, Krug Excavating, and Western (B-K), one project to a joint venture composed of defendants Palumbo, Madden, and Corbett (PMC), and two projects to defendant Arcole, and to submit collusive bids on those projects.

Count I charged that the combination and conspiracy were a violation of the Sherman Act, 15 U.S.C. § 1. The other counts charged the creation of a scheme to defraud the State and the United States of money and the right to competition in the awarding of contracts, and each count charged a mailing for the purpose of executing the scheme, in violation of 18 U.S.C. § 1341.

The appellants claim that there was insufficient evidence on which to make a finding of the conspiracy and scheme; that there was error in the instructions with respect to intent and theories of defense; that there were other trial errors.

II

Five construction projects are involved in this case. They were numbered 82, 83, 84, 85, and 88.

Ernest Bederman was president of defendant Arcole, a highway contractor, and was the government's key witness.

Corporate defendants Brighton and Krug Excavating bid jointly, and are referred to as B-K. Defendant Thomas Bowler was chief executive of Brighton and defendant George Krug, Sr., was president of Krug Excavating. Corporate defendants Palumbo (of which Peter Palumbo was president), Madden (of which Robert Madden was president), and Corbett (of which James C. Corbett was president) bid jointly and are referred to as PMC. Arcole also bid.

There was evidence, very largely supplied by Bederman, that before the bids were submitted, Bowler and Krug, Palumbo, Madden and Corbett, and Bederman had reached agreement that the bids would be filed in such pre-arranged fashion that B-K would be the only or the low bidder on jobs 82 and 83, Arcole on 85 and 88, and PMC on 84.

As "security" for performance of the agreement, B-K wanted Bederman to take possession of the PMC bidding books (the documents needed to make a bid) on 82 and 83. PMC wanted Bederman to take possession of the B-K bidding book on 84. Bederman testified that he did take possession of all these books, but that B-K must surreptitiously have taken back its bidding book on 84. B-K submitted a bid on 84 as well, lower than the PMC bid, and B-K was awarded the contract. Krug told Bederman they had "dumped" 84, but had not "bothered" Arcole's jobs.

There is no question but that Bederman's testimony traced the making of an agreement. He met first with Bowler and Krug and later with Palumbo, Madden, and Corbett. He testified that he reported back to Bowler and Krug, and on the morning of July 29, Bederman, Palumbo

and Madden were together with Bowler and Krug in the hotel quarters of the latter. He testified that all agreed to the plan of collusive bids.

Defendants question Bederman's testimony that after meeting with PMC he reported back to B-K so as to accomplish an agreement, and they further question his testimony that he had on the table in front of him at the hotel quarters the B-K bidding book on 84 as well as the PMC bidding books on 82, 83, 85, and 88, and that by distracting him in some way B-K "got their proposal book out of the stack of proposals in front of me." We are unable to say that the testimony is inherently incredible. The jury could decide, as they apparently did, that it was true.

Counts II through XXXVIII were the mail fraud counts. Each count charged defendants with causing a mailing by a third party, usually the State of Illinois. The mailings all occurred after July 29, 1975 and contained returns of bidding documents, awards of contracts, and payments for work performed.

The PMC defendants argue that they cannot be convicted of these uses of the mails because the mailings occurred after the PMC defendants were no longer members of any conspiracy to carry out the scheme. These mailings by the State were, however, virtually inevitable results of activity on and before July 29. The PMC defendants could properly be found to be jointly responsible with others for setting the scheme in motion up to that time, and thus causing the mailing by third parties. Thus defendants could be found criminally liable for the mailings which necessarily resulted from earlier activity which these defendants conspired to bring about.

Defendants have not challenged the proposition that these mailings advanced the execution of the scheme.

III

Defendants contend that the jury was not sufficiently and properly instructed on the element of intent. Excerpts from the instructions, bearing on that point, were as follows:

> "Under Section 1 [of the Sherman Act], it is a crime for any person or corporation to make any contract, or engage in any combination or conspiracy in unreasonable restraint of interstate commence. To convict a defendant under this section of the law the Government must establish beyond reasonable doubt that a defendant made a contract, or that a defendant was knowingly and intentionally a member of a combination or conspiracy; that the purpose of the contract, or of the conspiracy was to achieve an objective that would create an unreasonable restraint on interstate commerce.
>
> "It is not necessary to find a specific intent to violate the law, for the parties are deemed to have intended the necessary and direct consequences of their acts.
>
> ". . . To convict a defendant of this crime the Government must prove beyond a reasonable doubt that he was a member of a conspiracy whose purpost was to effect an unreasonable restraint on interstate or foreign commerce.
>
> ". . . A conspiracy under Section 1 of the Sherman Act is an agreement—is an agreement by two or more persons or corporations to accomplish a common objective which would result in an unreasonable restraint of interstate commerce.
>
> . . . .
>
> "To be a member of the conspiracy a party must know of it, and intentionally assist in its furtherance. . . .
>
> . . . .
>
> "Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint in interstate com-

merce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

"Where conduct unreasonable per se is shown, it cannot be justified or excused by the elimination of competitive evils, or the good motives of the conspirators, or the fact that prices were not unreasonably high or arbitrary."

We think it is a fair summary of these instructions that in order to convict defendants, it must be proved that they intentionally agreed or formed a combination or conspiracy for the purpose of rigging the bids and thus allocating the contracts among themselves; that because an agreement, combination, or conspiracy to rig the bids and allocate the contracts is per se an unreasonable restraint of trade, it is not necessary that the government prove that such conduct is an unreasonable restraint of trade; that it is unnecessary for the government to prove that the defendants knew that the agreement, combination, or conspiracy to rig the bids and allocate the contracts was a violation of the law.[1]

Defendants challenge the sufficiency of the instructions with respect to the element of intent. The B-K defendants expressly concede that the instructions on this subject were in accord with the interpretation of the "pre-1974 case law." All defendants argue that the law must necessarily have

[1] Although knowledge that intended conduct was unlawful need not be proved, the government points out that each bid was accompanied by an affidavit that the bidder and its agents have not directly or indirectly entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with the bid.

changed at the time Congress increased the maximum penalties for § 1 violation from one year imprisonment and a $50,000 fine to three years imprisonment and a $1,000,000 fine, and raised the offense from a misdemeanor to a felony. Pub. L. 93-528, § 3, 88 Stat. 1708, Dec. 21, 1974, amending 15 U.S.C. § 1.

Defendants relied in part on *United States* v. *United States Gypsum Co.,* 550 F.2d 115 (3d Cir. 1977). After oral argument in the case before us, we had the benefit of the decision of the Supreme Court in *Gypsum,* 46 L.W. 4937.

Defendants' briefs on appeal have not set out, nor pointed out in the record, the text of any instruction they requested. We do find in the record Instruction No. C-21, apparently requested by the PMC defendants, but refused by the court. C-21 asserts that proof of "specific intent" is required, and that "To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." Defendants were not entitled to an instruction which included the last phrase. "A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." *Gypsum,* 46 L.W. at 4944.

The alleged offense in *Gypsum* occurred before the 1974 amendment. The Supreme Court noted the 1974 increase in penalties and reasoned that "The severity of these sanctions provide further support for our conclusion that the Sherman Act should not be construed as creating strict liability crimes." 46 L.W. at 4943, footnote 18. Although the Court observed at that point that the increased penalties were not applicable to the charges before it, there is no suggestion that the intent requirement would be different in offenses committed after the amendment.

Defendants all argue that the jury must be instructed that in order to convict, the jury must find that defendants acted with intent to restrain trade or commerce.[2]

Of course *Gypsum* does support the general proposition, contended for by defendants, that intent is an element of the offense. "For these reasons, we conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element." 46 L.W. at 4943.

There is a difference, however, between the case before the Supreme Court in *Gypsum* and the case before us. We consider the difference significant.

In *Gypsum,* the government proved defendants' practice of telephoning a competing producer to determine the price at which gypsum board was currently being offered to a specific customer. That practice was not, by itself, an unreasonable restraint, unlawful *per se.* The government contended that these price exchanges were part of an agreement and had the effect of stabilizing prices and policing agreed upon price increases. The offending instruction was that the defendants' purpose in the price verification practice was essentially irrelevant if the jury found that the effect of verification was to raise, fix, maintain, or stabilize prices.

An agreement for price maintenance is an unreasonable restraint, unlawful *per se* under the Sherman Act. *U.S.* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 218 (1940). We do not read *Gypsum* as indicating that once defendants are proved to have intentionally made an agreement which is

[2] We do not find any requested instruction to this effect. The government does not claim failure to preserve the issue. We have not attempted to trace this subject through the conference on instructions and objections noted, but address the issue as properly before us.

unlawful *per se,* there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce.

The conduct directly proved in *Gypsum,* the practice of price verification, was not *per se* unlawful. The Supreme Court held that in terms of criminal liability it was not enough to find price stabilization as a consequence of the practice, without also finding that these consequences were intended, at least at the level of knowledge of the probability of those consequences.

In the case before us the jury was instructed that in order to convict it must find that defendants were knowing members of a conspiracy whose purpose was to effect an unreasonable restraint on interstate or foreign commerce and that bid-rigging is regarded as unreasonable *per se.*

A conspiracy to submit collusive, non-competitive, rigged bids is a *per se* violation of the statute. *United States* v. *Flom,* 558 F.2d 1179, 1183 (5th Cir. 1977); *United States* v. *Finis P. Ernest, Inc.,* 509 F.2d 1256 (7th Cir. 1975), *cert. denied* 423 U.S. 874 and 893; *United States* v. *Champion Intern. Corp.,* 557 F.2d 1270 (9th Cir. 1977), *cert. denied* 434 U.S. 938.

As the government put it in its brief, "Since the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'"

Defendants do not challenge the sufficiency of the evidence of the interstate character of trade or commerce affected, nor do they claim instructions on that issue were erroneous.

We conclude that the issue of intent was adequately submitted here where the court instructed that, in order to convict it must be proved that defendants knowingly agreed or formed a combination or conspiracy for the purpose of rigging the bids, and intentionally assisted in its furtherance.

IV

A.

The district court instructed in part:

"Defendants . . . have presented a theory of defense that none of them entered into any agreement to submit collusive, non-competitive, highway construction bids, as charged against them in the indictment."

This indeed was their attempted defense. They endeavored to support it by showing circumstances designed to demonstrate that the bids were more probably the result of economic factors, independently considered, than of agreement among defendants. B-K considers that it was entitled to have the court alert the jury to this theory of the relevancy of such circumstances.

B-K successively requested two instructions far longer than the portion given, and above quoted, and longer than would have been required to alert the jury to the supporting proposition just referred to. The requested instructions listed a number of categories of "economic factors and operating costs" explanatory of the bids and also instructed that the jury may consider several particular items or categories of evidence.

Judge Flaum had invited revision of the first request and apparently, and understandably, did not consider the second an improvement. We think the requests went considerably beyond a statement of the theory of defense. We

find no abuse of discretion in rejecting all but the portion given. See *United States* v. *Bessesen*, 445 F.2d 463, 467 (7th Cir. 1971).

B.

Defendants express concern that the jury may have based the guilty verdict on the undisputed fact that defendants met and talked about the highway construction jobs without being convinced that they reached an agreement to rig the bids. They wanted an instruction that a conversation between competitors which does not give rise to an agreement is not, taken alone, a violation of the antitrust laws. Two of the three requested and refused instructions on that subject came fairly close to the mark.

The district court did, however, make it abundantly clear that there was an offense only if defendants knowingly made a contract or agreement. As we view the case, and in the light of this emphasis, we see no possibility that the jury was misled into believing that the meeting and discussion, without agreement, was an offense.

C.

The district court gave an instruction on the subject of withdrawal from a conspiracy by one who has previously been a member. The instruction was requested by the government because of the circumstances of B-K's decision, after the alleged formation of the conspiracy to bid Job 84. Objections were somewhat equivocal. PMC offered its own version of a withdrawal instruction.

B-K now points out that a withdrawal defense is meaningless in the context of a charge of conspiracy arising under the Sherman Act, unless, as is not true here, a defendant claimed that the statute of limitations had run since his withdrawal.

B-K now argues that the instruction was not only inappropriate, but prejudicial because it misled the jury "into believing that the defendants were relying on a weak and legally insufficient defense."

The jury noticed this portion of the instructions, for they sent a note during deliberations quoting a sentence from it and asking for a definition of a phrase. The court denied the request for elaboration. It seems probable that the jury was considering whether either B-K or PMC had withdrawn before the bids were filed, and their consideration of that question was surely not prejudicial to B-K.

We cannot conclude that the giving of the withdrawal instruction was prejudicial.

V

The district court sent a copy of his instructions to the jury room. Defendants contend this was an abuse of discretion because the government and most of the defendants objected.

Sending a copy of the instructions to the jury room is approved in this circuit. *United States* v. *Silvern*, 484 F.2d 879, 883 (7th Cir. 1973); *United States* v. *Donner*, 497 F.2d 184, 194 (7th Cir. 1974).

We find no abuse of discretion here. We do not agree, moreover, that the two notes of inquiry sent by the jury demonstrate that the practice generated confusion.

VI

Robert J. Madden, James C. Corbett, Peter Palumbo, and George B. Krug, Jr. were not defendants, but were officers of corporate defendants. They had been granted use immunity under 18 U.S.C. §§ 6002-6003 and had testified before

the grand jury. They were called as witnesses at trial, and where they gave testimony favorable to defendants and inconsistent with their grand jury testimony, the grand jury testimony was admitted in evidence. Under Rule 607, Federal Rules of Evidence, the government was permitted to impeach the witness it had called by introducing the inconsistent grand jury testimony. Such testimony was also substantive evidence. Under Rule 801(d)(1)(A) the prior statements were not hearsay at a trial where the declarants were subject to cross-examination.

There were numerous and significant instances where the grand jury testimony tended to convict and the trial testimony did not.

Defendants say they do not attack the validity of Rule 801(d)(1)(A), nor claim the grand jury testimony was irrelevant or outside the literal scope of the Rule. Rather, they call for exclusion under Rule 403, permitting the court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

Defendants observe that when persons in the situation of these witnesses are called before the grand jury "their statements may be influenced by the subtle and not-so-subtle pressures which the prosecutor may apply in the isolation of the Grand Jury room." The suggested unfairness seems to rest on an inherent probability that witnesses in this situation would come closer to the truth in the trial setting than before the grand jury, and that the government should therefore be denied the procedure it followed here. We are not persuaded.

VII

PMC argues that the use immunity provided Robert J. Madden, James C. Corbett, and Peter Palumbo was vio-

lated when their testimony was used in a criminal case against their corporations. The corporations were closely held. These men were the managing officers and owned large percentages of stock.

Defendants cite no authority for the proposition that a criminal case against a closely held corporation is a criminal case against its principal stockholder. Doubtless conviction of the corporation impairs the financial interests of the stockholder, but we conclude that the use of the stockholder's testimony in a criminal case against the corporation is not use in a criminal case against the stockholder.

VIII

The government asked Bederman:

> "Mr. Bederman, prior to engaging in the conversations which you have related, what was your knowldege of grand jury investigations and prosecutions in the highway industry in Illinois?"

The court sustained a defense objection, struck the question, and instructed the jury then and, generally, later, to disregard stricken material.

Defendants argue that a mistrial was necessary because the question, though unanswered, had already left with the jury the prejudicial inference "that the road building industry in Illinois was honeycombed with corruption and price-fixing, and that these defendants were an integral part of it."

The government contends that it was intending to show the conspirators' knowledge of investigations and prosecutions in order to demonstrate actual knowledge that their scheme was unlawful. In any event we cannot agree that

the court's action was insufficient to avoid any possible prejudicial interpretation of the question.

IX

Defendants contend that the prosecutor improperly asked the jury to give weight to the guilty plea of another corporate defendant, Bederman's Arcole Midwest.

In answering defense attacks on Bederman's credibility, the prosecutor observed that "Bederman admits the guilt of his own company in this bid-rigging conspiracy. In his own mind it was and is guilty of the offenses charged. If one is to believe the defendants, no agreement was ever reached. If that is true, then Bederman must literally be off his rocker to come into this court and at this trial admit his company's guilt. But that is what the defendants ask you to believe. . . ." He went on to stress the improbability that Bederman would say his company was party to an unlawful agreement and expose it to liability if there was no agreement.

The court gave appropriate instructions at the end of the argument that a plea of guilty by one defendant is not evidence of the guilt of another.

The guilty plea had been made known to the jury by the defense. In cross-examination of Bederman they had used provisions of the plea agreement for impeachment. Bederman's testimony at trial was an admission of unlawful conduct by him and his company, and it was legitimate to argue that his testimony was credible because strongly against self-interest. The prosecutor was not asking the jury to consider the guilty plea of an absent defendant except as part of a demonstration that Bederman was

speaking against self-interest and should be deemed credible.

Under the circumstances, we do not consider the argument improper.

The judgment appealed from is AFFIRMED.

A true Copy:

Testee:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States v. Thomas J. Gillen.

U.S. Court of Appeals, Third Circuit. No. 78-2082. Filed May 8, 1979. On Appeal from U.S. District Court, Middle District of Pennsylvania.

Case No. 2587, Antitrust Division, Department of Justice.

Before: ALDISERT, ADAMS and HIGGINBOTHAM, Circuit Judges.

Opinion

HIGGINBOTHAM, Cir. J.: The appellant, Thomas J. Gillen, was found guilty of conspiring to fix prices in violation of Section 1 of the Sherman Act. 15 U. S. C. § 1. He argues that the district court erred in not making specific findings on intent and that the evidence is insufficient to support the judgment of conviction. We disagree and affirm.

I

Gillen was charged, along with James J. Tedesco, with conspiring to fix, stabilize and maintain prices of anthracite coal in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act from 1966 through 1973.[1] The companies named in the indictment were engaged in the mining, processing and marketing of anthracite coal and were among its major producers and

[1] Tedesco pleaded nolo contendere. Six corporations and three individuals were also named in the indictment as co-conspirators: Blue Coal Corporation, Glen Burn Colliery, Inc., Greenwood Stripping Corporation, Lehigh-Navigation-Dodson Company, Lehigh Valley Coal Sales Company, Inc., Reading Anthracite Coal Company, William R. Dougan, Joseph A. Frank, and Carl J. Tomaine. Each of the companies and two of the individuals named in the indictment as co-conspirators pleaded nolo contendere in a related case. M. D. P. Crim. No. 76-149. The case against one of the individuals was dismissed because of his poor health.

sellers in the United States.[2] Substantial quantities of anthracite coal were sold and shipped to customers located outside of Pennsylvania.

From 1961 through November, 1973, the Anthracite Producers Advisory Board, composed of representatives of the major anthracite organizations, met monthly to consider and recommend the total anthracite production quota as provided in the federally authorized Production Control Plan for the Anthracite Industry. Four or five times a year, after adjournment of the Advisory Board meetings, the same company representatives who constituted the Advisory Board would discuss and reach tentative agreements on the prices each represented company would charge for the various sizes of coal for the ensuing months.[3] In addition, agreements were reached at these so-called "after meetings" on the timing of the price change as well as the company to initiate the change. After the tentative agreement was reached, the representatives would report to their superiors for their approval. When approved, as they generally were, anthracite price circulars were issued by the companies.[4]

[2] Virtually all anthracite coal produced in the United States during the period in issued, 1961 through November, 1973, was mined and processed in Pennsylvania. It was estimated that total sales per year exceeded fifty million dollars.

[3] These "after meetings" were held a month or so prior to the time price circulars would be issued. No mention of these price discussions was ever made in the official minutes of the Advisory Board. These "after meetings" were not authorized by the Production Control Plan and were not part of the Advisory Board's function.

[4] "In almost all instances all companies agreed to the same price." District Court Memorandum of Decision at 5-6. It was understood, however, that some of the prices printed by one or more of them could, at times, vary somewhat from the others if necessary to compensate for a peculiar market or inventory situation or other problems that a producing company might be encountering.

These circulars which were issued three or four times a year were price lists for the sale of coal to line dealers.[5] These line dealers were dealers who were not located in the immediate vicinity of the colliery and who generally received coal shipments by rail or truck.

Gillen became president of Blue Coal Corporation in 1967 and continued as such until late 1973. He was also a part owner of Blue Coal from 1966 until November 26, 1973. The government's chief witness, Carl Tomaine, was Blue Coal's vice president in charge of domestic and retail sales from 1968 through 1973. The court below found that Tomaine as sales representative for Blue Coal reported what occurred at the "after meetings" to Gillen, who was then president of the company. It found further that Gillen knew and approved of the actions of Tomaine in the agreements reached at these meetings. It concluded that Gillen was a knowing participant in the price-fixing conspiracy from 1966 to November 2, 1973. Gillen was sentenced to a suspended prison term of six months, a $35,000 fine and two years probation.

II

A. Precepts of Law

With commendable vigor, Gillen's present counsel contends that "The district court erred in holding that intent is not an element of a criminal price-fixing conspiracy charge." The validity of appellant's argument depends on whether the United States Supreme Court in *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978) changed

[5] The circular represented the published price for the sizes of coal listed thereon, and the prices at which the companies actually sold it. At times, however, the companies sold above or below the circular price. When sales were made below the circular price, however, the circular price was used as the level from which discounts were determined.

the law of more than four decades on proof of intent in a price-fixing conspiracy case. *Gypsum* was decided a week after the trial judge filed his Memorandum of Decision containing findings of fact and verdict of guilty.[6] We must nevertheless consider *Gypsum* because we must apply the law in effect as of the time we render this decision. *Bradley* v. *School Board of City of Richmond,* 416 U. S. 696 (1974).

In determining the applicability of *Gypsum* to the instant case we have within the "hierarchy of legal precepts" a situation where "the rule of law is clear and the sole question is application to the facts at bar." Aldisert, *Writing Judicial Opinions,* III-2 (1979) (unpublished manuscript). See also Aldisert, *The Judicial Process,* 59-71 (1976).

B. The Different Factual Situations

At issue in *Gypsum* was whether an exchange of price information for purposes of compliance with the Robinson-Patman Act, 15 U. S. C. § 13, was exempt from Sherman Act scrutiny. The defendants claimed that the purposes of these price exchanges were to permit them to take advantage of the "meeting competition" defense of Section 2(b) of the Robinson-Patman Act and to prevent customer fraud. The government alleged that this system of interseller price verification had the effect of stabilizing the price of gypsum board in violation of section 1 of the Sherman Act. The Court concluded that interseller price verification could not be used to establish a good faith defense under Section 2(b) by sellers with "lying buyers."

Thus *Gypsum* was not a situation where the parties agreed that a certain price would be charged; at most the parties sought information on what price had been or was being

[6] On June 21, 1978, the trial judge filed his Memorandum finding Gillen guilty as charged. The Supreme Court decided *Gypsum* on June 29, 1978.

charged with no agreement or request for information on the price a competitor would charge in the future. In contrast, we have parties in the instant case who met three or four times a year "to discuss the coal prices that would appear on the circulars" . . . and to "reach a tentative agreement concerning the prices to be charged by the companies. . . ." Memorandum, Findings of Fact and Verdict, p. 2.

C. The Precepts Announced by the Trial Court and the Supreme Court

The trial judge, relying on *United States* v. *Patten,* 226 U. S. 525 (1912) and *United States* v. *Griffith,* 334 U. S. 100 (1947), held:

> There is no need to show any specific intent to restrain trade if a conspiracy to fix prices is shown to exist in an industry, the very nature of which involves large shipments of coal from the District in Pennsylvania to other states. See *U. S.* v. *Griffith,* 334 U. S. 100, 105[,] 92 L. Ed. 1236, 1242 (1947); *U. S.* v. *Patten,* 226 U. S. 525, 543[,] 57 L. Ed. 333, 342 (1919). In the *Patten* case it was said:
>
> ". . . [t]he conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result."
>
> "Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act." *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 84 L. Ed. 1129 (1939) at 1166.

The above holding by the trial court stated the principles set forth in cases for more than four decades. Thus Judge

Herman was merely following the traditional precepts long accepted in price-fixing cases, most notably in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) which he explicitly cited.

Appellant contends that, regardless of the prior law, the trial judge erred because the Supreme Court in *Gypsum*, speaking through Chief Justice Burger, announced a different principle of law when it stated:

> [A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken by the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.

98 S. Ct. at 2872.

Thus the ultimate issue is whether this language changed the long-established rule of law on price-fixing cases by requiring a more stringent burden of proof on the issue of intent.

Recognizing that the parameters of the conduct regulated by the Sherman Act may be at times elusive, we believe the Supreme Court's statement in *Gypsum* on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price-fixing conspiracies, for the Court stated:

> With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive side effects, see, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only *after the fact* is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment. (emphasis added)

Id. at 2875-76.

We submit that the Court did not intend any extraordinary change in the rules of law on price-fixing cases because by its very citation of *Socony-Vacuum* the court acknowledged that price-fixing cases are an exception. Moreover, price-fixing is clearly not "conduct which only *after the fact* is determined to violate the statute." *Id.*

Price-fixing is an area of the law in which people either can or ought to be able to predict the legal consequences of their actions. Price fixers do not even approach "the gray zone of socially acceptable and economically justifiable business conduct," 98 S. Ct. at 2875, for the Supreme Court nearly forty years ago created a bright-line prohibition by declaring:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

. . . .

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

United States v. *Socony-Vacuum Oil Co.*, 319 U.S. 150, 221, 223 (1940).

Thus in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy. The conduct at issue in *Gypsum* concededly was of such a nature at to warrant a further inquiry into intent. The Supreme Court's concern with those who unwittingly violate antitrust laws has no place here. Here, defendants have fixed prices, "probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free competition."[7] The act of agreeing to fix prices is in itself illegal; the criminal act is agreement.

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[7] *Mid-west Paper Products* v. *Continental Group, Inc.* Nos. 78-1736, 78-1746, 78-1776, 78-1796, slip. op. at 44 (3rd Cir. Mar. 26, 1979) (Higginbotham, J., dissenting).

The Supreme Court recently reemphasized:

"In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978); *Continental TV, Inc.* v. *GTE Sylvania Inc.* 433 U. S. 36, 50 (1977), and so often "lack . . . any redeeming virtue." *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."

Broadcast Music, Inc. v. *CBS, Inc.* 47 U. S. L. W. 4359, 4361 (Apr. 17, 1979).

Moreover, even if read to apply here, *Gypsum* does not require a reversal because the intent requirements will always be met in a case involving a price-fixing conspiracy. If a defendant intends to fix prices, he necessarily intends to restrain trade. In *Gypsum*, the element lacking was a finding that the defendants knew that the exchanges of price information would have the probable effect of fixing or establishing prices. 98 S. Ct. at 2877. In defining the standard, the Court held that knowledge that the actions will result in restraining trade is enough. Here, where their actions were nothing less than price-fixing, the violators cannot be heard to argue that they did not know that their meetings and discussions of prices would result in an unreasonable restraint on trade.

Additionally, the mere existence of a price-fixing agreement establishes a defendant's illegal purpose. As the Court stated in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1926), "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." Thus, the conscious object of every price-fixing conspiracy is an illegal act.

Unlike *Gypsum* where the defendants allegedly did not appreciate the consequences of their actions, here the law is clear and the conduct egregious. The conspirators met and set prices. They did not engage in any subtle or sophisticated scheme; their actions were in no way ambiguous. We agree that fairness requires caution in presuming intent from a mere effect on prices where the defendant's actions might reasonably be considered not to violate the antitrust laws. But where, as here individuals have fixed prices in a most unequivocal and flagrant manner, questions of knowledge of probable consequences and indeed of "conscious object" appear clearly answered.

III.

A.

On review, we must determine whether there is substantial supportive evidence for the district court's findings on the ultimate factual question of guilt. *United States* v. *Delerme,* 457 F.2d 156, 160 (3d Cir. 1972). With respect to the elements of the crime, the Supreme Court has held "that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime." *United States* v. *Wise,* 370 U.S. 405, 416 (1962). As a result, we must determine whether there is substantial evidence of knowing participation by Gillen in the price-fixing conspiracy. Our review of the evidence satisfies us that substantial supportive evidence of such knowing participation exists.

First, it is undisputed that a price-fixing conspiracy existed. Second, we think that there is substantial evidence to support the district court's finding that Gillen knew of the conspiracy. Tomaine, sales representative for Blue Coal, reported to Gillen what occurred at the "after meetings" keeping Gillen abreast of coal pricing.[8] Tomaine

[8] By Mr. Currier:

"Q. From 1966 to the end of 1973, to your knowledge did Blue Coal ever issue a circular without your attending one of these meetings?

"A. Not that I can recall.

"Q. Did you inform anyone at Blue Coal about these price meetings?

"A. Yes.

"Q. Who was that?

"A. Well, if Mr. Gillen was available, I spoke to him about it.

testified that he informed Gillen at the "after meetings" they had "agreed to go along on certain prices."[9]

Finally, with regard to Gillen's participation in the conspiracy, Joseph J. Fauzio, President of the Greenwood Stripping Company, and one of the unindicted co-conspirators, testified that:

Q. On the occasion of the Anthracite Committee meetings, Mr. Fauzio, do you recall any discussion on the

"Q. When did you begin telling him of these meetings?

"A. I would just have to assume sometime after he became President.

"Q. For how long thereafter did you talk to him about these meetings?

"A. Throughout 1973 whenever he was available I would talk to him about it.

"Q. I didn't understand your answer, sir.

"A. Throughout 1973 whenever he was available I would talk to him about it, yes.

"Q. Did you speak to him in years prior to that about it?

"A. Yes.

"Q. What would you tell Mr. Gillen during these discussions?

"A. The proposed price increase or decrease.

Transcript 379-380.

[9] [By the Court]

"Q. Did you ever explain to him that you were up there agreeing on prices?

"A. I explained to him that we were up there discussing prices and what we were going to do for the coming circular whether there was an increase or decrease.

"Q. You told them you were discussing prices?

"A. And we agreed to go along on certain prices, yes sir.

"Q. And you told them that you were—these were the prices that you were going to charge at Blue Coal?

"A. Yes, sir."

Transcript 468.

occasion of such meetings either before, during or after with regard to the topic of price circulars?

A. The only discussion would be in a social atmosphere, whereas, someone would make the statement that it's about time that the boys get together and start thinking about the circular. This was done, to my knowledge, it had been mentioned by Mr. Tedesco, Mr. Ulmer, Mr. Gillen and myself.

J. What is the full name of Mr. Gillen that you are referring to?

A. Mr. Tom Gillen.

Transcript 41-42.

Additional evidence of direct involvement by Gillen is the testimony of several witnesses regarding a meeting in the winter of 1966-1967 at Brutico's Restaurant, Old Forge, Pennsylvania. The meeting was attended by owners, producers and sales representatives who agreed to re-establish price stability by attempting closer adherence to the circular price. Gillen was present and actively participated in criticizing the sales people for their price cutting activities.[10]

Furthermore, as president of the company, Gillen was in a position to order the price-fixing halted, but did not do so. When a company president has knowledge that his company

[10] Gillen contended that this was merely a "social gathering" during which concerned coal executives met to advocate a stabilization of a depressed industry. The government characterized the meeting as a mechanism for shoring up deviations from the price stability promoted by the circular "after meetings." After having been exposed to these conflicting scenarios, Judge Herman was apparently persuaded that the Brutico meeting was an indication that Gillen was a participant in the overall conspiracy. (See Appendix at 58; Memorandum Decision at 12). Several witnesses described the nature of the meeting and testified that Gillen attended.

is involved in a price-fixing conspiracy and takes no action to stop it, he may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates. See *United States* v. *Wise,* 370 U. S. 405 (1962). If this were not the rule, the highest corporate officers would, in effect, be beyond the reach of the antitrust laws even when their companies are actively engaged in price-fixing.

B.

For the first time on appeal, Gillen pointed to an apparent ambiguity in the transcript with respect to testimony relied on by the Government in support of an affirmance:

Q. Did you ever explain to him that you were up there agreeing on prices?

A. I explained to him that we were up there discussing prices and what we were going to do for the coming circular whether there was an increase or decrease.

Q. You told *them* you were discussing prices?

A. And we agreed to go along on certain prices, yes, sir.

Q. And you told *them* that you were—these were the prices that you were going to charge at Blue Coal?

A. Yes, sir.

Transcript 468 (emphasis added).

Defendant argues that the references to "them" make the testimony too vague and unclear to support a finding of knowledge of the conspiracy. Alternatively, counsel for Gillen urged at oral argument a remand to clear up the record on this point. We disagree. First, the trial judge in fact considered the matter during the closing argument concluding that "It doesn't say to him but it's implied," and "I don't believe I said them, I was intending to say did you

tell him."[11] It seems clear from the context, and Judge Herman so indicated, that the witness understood what was meant. Second, despite the discussion of this matter by the trial judge and government counsel, Gillen's trial counsel did not object to the trial judge's determination of the question and alluded to it only in passing in his brief on appeal. It is not this Court's practice to allow arguments of this nature to be raised on appeal if they were not pressed below. See *United States* v. *Dansker,* 537 F.2d 40, 64 (3d Cir. 1976).

C.

Finally, we find Gillen's argument of withdrawal totally without merit. He argues that he began removing himself in 1972 from Blue Coal except for labor negotiations and his efforts to sell the company. From this he argues that the government was required to prove his continuous participation in the conspiracy by introducing evidence of continued overt acts. The burden is, however, on the defendant to prove "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States* v. *United States Gypsum Co.,* 98 S. Ct. at 2887; *United States* v. *Heckman,* 479 F.2d 726, 729 (3d Cir. 1973). In addition, Tomaine testified that he continued to inform Gillen of the price-fixing meetings until the business was sold in late 1973.[12]

For these reasons, the judgment of sentence will be affirmed.

[Concurring Opinion]

ADAMS, Cir. J., concurring: I concur in the judgment of this Court and join in parts I and III of the Court's opinion.

[11] Transcript of Proceedings on Argument at 8-11.

[12] Transcript, *supra,* note 8.

However, because the majority's discussion regarding the issue whether intent must be shown in a price-fixing case diverges from my understanding of the present state of the law on this important subject, I have undertaken a separate statement.

Specifically, the majority appears to adhere to the position that intent is not a necessary element in establishing a price-fixing violation under § 1 of the Sherman Act. Rather, the majority asserts that "the Supreme Court's statement in *United States* v. *United States Gypsum Co.,* 98 S. Ct. 2864 (1978) on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price-fixing conspiracies."[1] In my view, this stance cannot be squared with the explicit conclusion arrived at in *Gypsum*: "The criminal offenses defined by the Sherman Act should be construed as including intent as an element."[2] This conclusion by the Supreme Court was specifically grounded on its "unwilling[ness] to construe the Sherman Act as mandating a regime of strict liability criminal offenses."[3]

Accordingly, whereas under the majority's approach a defendant who is prosecuted for participating in a price-fixing conspiracy or in any other combination that constitutes a *per se* violation of the Act would not be entitled to a jury charge on intent, I regard such an instruction, when requested, to be mandatory after *Gypsum.* However, in Gillen's case it appears that the failure of the trial judge —who sat without a jury and operated without the benefit of the *Gypsum* pronouncement—to make an explicit determination regarding intent did "not affect the substantial

[1] Typed opinion at 6-7.

[2] 98 S. Ct. at 2876 (footnote omitted).

[3] *Id.* at 2872-73 (footnote omitted).

rights of" Gillen.[4] Therefore, I join the majority in its affirmance of the judgment of the district court.

As I understand the *Gypsum* opinion, it instructs that whether the criminal offense charged under section 1 of the Sherman Act is a *per se* violation or whether at the other end of the spectrum it approaches "the gray zone of socially acceptable and economically justifiable business conduct," [5] the government must meet its burden of establishing intent. *Gypsum* declares that the prosecution may meet this responsibility under one of two standards. If a defendant is charged with engaging in illegal conduct the anticompetitive effects of which did not come to fruition, *Gypsum* directs that an "elevated standard of intent" must be satisfied before criminal liability may be imposed—namely, that the defendant had the specific intent or conscious purpose to produce the anticompetitive consequences.[6] On the other hand, if anticompetitive effects actually resulted from the defendant's actions, the government need prove only that the defendant had knowledge of the probable consequences of his acts.[7] Moreover, in establishing knowledge, the government, under the guidelines set forth in *Gypsum,* may not rely on a presumption that a defendant intends the necessary and direct consequences of his acts, although an anticompetitive effect "may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted." [8]

[4] See 28 U. S. C. § 2111 (harmless error rule).

Also, inasmuch as no plain error was committed by the district judge, reversal would not appear to be warranted since no request was made at trial for a determination regarding intent. See note 22 and accompanying text *infra.*

[5] 98 S. Ct. at 2875.

[6] *Id.* at 2877 n. 21.

[7] *Id.*

[8] *Id.* at 2878.

In sum, the Supreme Court held in *Gypsum* "that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices."[9] Contrary to the majority's reading of *Gypsum,* these two aspects of the holding appear to have clarified an unsettled area of law and to have overruled prior precedent that had developed in the wake of *United States* v. *Patten,* 226 U.S. 525 (1913). The Supreme Court stated in that early case, which reversed the dismissal of a criminal indictment:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion (sic), for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation chargeable with intending that result.[10]

Patten had been regarded, first, as negating a requirement of specific intent in criminal antitrust cases;[11] indeed, it had been thought, as the district court's jury charge in *Gypsum* attests, that no intent whatsoever need be established in criminal antitrust cases when it is shown that the defendant's conduct had anticompetitive effects.[12] *Patten* has also been cited for the proposition that it may be conclusively presumed that a defendant intends the necessary

[9] *Id.* at 2872.

[10] 226 U. S. at 543.

[11] See, *e. g., United States* v. *Champion Int'l Corp.* 557 F. 2d 1270, 1274 (9th Cir.), cert. denied, 434 U. S. 938 (1977).

[12] See *Gypsum, supra,* 98 S. Ct. at 2872.

and direct consequences of his acts.[13] Neither of these interpretations of *Patten* would appear to survive *Gypsum* intact. The first—that proof of specific intent is not required—now applies only to cases where anticompetitive effects have been demonstrated. The second—that a defendant may be conclusively presumed to intend the necessary consequences of his acts—has been discarded altogether.[14]

Turning to the present case, it appears that there was no need for the prosecution to establish that Gillen had a conscious purpose to achieve anticompetitive results—the level of intent required in cases where anticompetitive effects cannot be shown. Rather, it was sufficient for the government to demonstrate that Gillen knew that the price-fixing conspiracy would produce such effects. This is so because the district court found that Gillen and the other parties named in the indictment knowingly entered into a conspiracy to fix prices, whereby the prices contained in the corporate defendants' price lists during the years 1966-73 were set by agreement among competitors.[15] Such a price-fixing arrangement is a *per se* violation of the Sherman Act, which means that there necessarily are anticompetitive effects, since the *per se* characterization is reserved for those combinations "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable."[16] And, inasmuch as an ongoing price-fixing scheme spanning at least seven

[13] See, *e.g.*, *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000, 1002 (9th Cir. 1972), cert. denied, 409 (U. S. 1125 (1973).

[14] See Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1399 (1978).

[15] See *United States* v. *Gillen*, Crim. No. 77-72-2, typed opinion at 5-9 (M. D. Pa., June 21, 1978) (memorandum).

[16] *Northern Pacific Ry. Co.* v. *United States* 356 U. S. 1, 5 (1958).

years was found to exist rather than an incipient conspiracy that had not yet borne fruit, it cannot be said that the anticompetitive effects "did not [yet] come to pass" so as to necessitate the establishment by the government of the "elevated standard of intent."[17]

The Supreme Court has narrowly circumscribed the situations in which a fact-finder may reasonably conclude that a defendant lacked the requisite knowledge to support criminal liability for violating section 1 of the Sherman Act. Under the Court's teaching in *Gypsum*, all that is demanded for purposes of satisfying the knowledge requirement is that the defendant have a rudimentary awareness of economic cause and effect, and therefore "that the defendant had knowledge of the probability of . . . [the anticompetitive] consequence at the time he acted."[18] Thus the government need not prove that the defendant knew that the effects of the conduct or the conduct itself were proscribed, since mistake or ignorance of the law is no defense.[19] Nor is it generally essential under this lesser intent standard that the prosecution prove that the defendant engaged in the illegal conduct with an improper purpose in mind.[20]

Where, as here, the conspirators have been found to have met systematically and periodically for at least seven years to fix prices, it is not fairly plausible that they did not know that they were tampering with the supply and demand curve of the competitive market. To paraphrase the Supreme Court, "[t]he business behavior which [gave] rise to criminal antitrust charges [here] is conscious behavior normally undertaken only after full consideration of the costs, bene-

[17] See *Gypsum, supra*, 93 S. Ct. at 2877 n. 21.

[18] 98 S. Ct. at 2878.

[19] See *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 1, 297-98 (1978).

[20] See 98 S. Ct. at 2879 n. 23.

fits and risks." [21] Accordingly, I cannot say on the record before us that the omission by the trial judge of a specific finding that the defendants knew that their conduct would produce anticompetitive results affected the substantial rights of Gillen so as to warrant a reversal, particularly where such a finding was not requested.[22] Therefore, I concur in the judgment of the Court.

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[21] *Gypsum, supra,* 98 S. Ct. at 2878. In this respect, the conduct involved here is to be distinguished from the exchange of price information that marked *Gypsum,* where it may well be doubted whether the defendants knew that anti-competitive consequences could be expected to flow from their activity. See *id.* at 2875 & n. 16. See also Handler, *supra* note 14, at 1399-1400.

[22] See note 4 *supra.* Gillen's defense, which was predicated in large measure on the assertion that he had no knowledge of, and never authorized or ratified the price-fixing agreements entered into by Tomaine, his company's sales representative, addressed the different question whether Gillen knowingly joined the conspiracy. As the Supreme Court explained in *Gypsum,* "[i]n a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See LaFave and Scott, Criminal Law 464-465 (1972). Our discussion here focuses only on the second type of intent." 98 S. Ct. at 2876 n. 20. With respect to the first type of intent—whether the defendants in this case intended to agree upon a conspiratorial course of conduct, the district court determined both that a conspiracy was knowingly formed and that Gillen was a knowing participant. The trial judge also held that there was no need for the government to prove specific intent to restrain trade, a holding that properly reflects the law even after *Gypsum.* Typed opinion of the district court at 9-13.